DETERRING AIRPORT TERRORIST ATTACKS AND COMPENSATING THE VICTIMS

I. INTRODUCTION

One of the more tragic manifestations of current international political unrest is the terrorist attack on passengers in air terminals. On May 30, 1972, members of the Japanese Red Army terrorist group assaulted passengers in the baggage claim area of Lod International Airport at Tel Aviv with explosives and automatic weapons.[1] On August 5, 1973, terrorists of the Black September organization launched a similar attack on passengers in the international transit lounge of Athens' Hellenikon Airport, killing three persons and wounding more than fifty.[2] Security measures originally designed to forestall aircraft hijackings and sabotage are apparently inadequate to prevent attacks in airports.[3] Consequently, a serious possibility of more airport massacres exists. Indeed, to the extent that aircraft themselves are rendered less attractive targets because of effective security measures, passengers in air terminals may be in more danger now than before the advent of strict airport security.

If further attacks can be expected, effective legal means must be developed to accomplish two important goals: terrorist attack deterrence and compensation to the victims. This Comment examines the alternative approaches under current law, focusing special attention on two recent decisions[4] holding the

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[1] N.Y. Times, May 31, 1972, at 1, col. 8.

[2] *Id.*, Aug. 6, 1973, at 1, col. 6.

[3] Air transportation has frequently been a target for those using violence to attract media attention to political dissatisfactions. Approximately 343 aircraft hijackings occurred between 1961 and 1973. Although United States aircraft were the most favored targets, aircraft registered in sixty other nations were also seized. *See* Evans, *Aircraft Hijacking: What is Being Done*, 67 AM. J. INT'L L. 641, 643 (1973). Governmental concern over hijacking led to the imposition of strict anti-air piracy measures in many nations. *Id.* at 648-53. In the United States airport anti-hijacking measures are usually twofold: magnetometers are used in the boarding passageways leading to aircraft to detect metal objects and hijacker behavioral profiles are used to alert security guards to the characteristics of potentially dangerous persons. Abramovsky, *The Constitutionality of the Anti-Hijacking Security System*, 22 BUFFALO L. REV. 123, 131-32 (1972). The phenomenon of terrorist attacks in airport terminals presents an unmet challenge to law enforcement officials. The magnetometers and behavioral profiles may help prevent actual seizure of aircraft, but they are incapable of deterring terrorists who enter a terminal undetected and indiscriminately attack waiting passengers.

[4] Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977) (en

airline liable under the Warsaw Convention[5] for injuries to passengers sustained in the Hellenikon attack. The principal findings are that all of the current approaches are faulty in various respects but one approach—suits against the governments controlling the airports—is superior to the others. The final conclusion is that legal or extra-legal reforms are needed to meet the problems of airport terrorist attacks adequately.

II. Strict Liability of Air Carriers Under The Warsaw Convention

A. Day *and* Evangelinos

In *Day v. Trans World Airlines, Inc.*[6] and *Evangelinos v. Trans World Airlines, Inc.*[7] the Second and Third Circuits ruled that passengers could recover for injuries sustained in the Hellenikon Airport attack of 1973.[8] Recovery in both cases was based on provisions of the Warsaw Convention[9] and the Montreal Agreement[10] that create an irrebuttable presumption of air carrier liability for injuries sustained while embarking. These results do partially meet the objective of compensating injured passengers but generally cannot withstand close analysis either as applications of the Warsaw Convention and prior case law or as matters of public policy.[11]

The facts which gave rise to the litigation in *Day* and *Evangelinos* can be summarized briefly. The terrorist raid occurred at approximately 3:00 P.M. Athens time.[12] Before that hour the passengers scheduled to depart on TWA's flight 881 to New York were occupied with the normal preparations for in-

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banc); Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

[5] Warsaw Convention, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (ratified by the United States Oct. 29, 1934).

[6] 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

[7] 550 F.2d 152 (3d Cir. 1977) (en banc).

[8] In *Day* the court affirmed the district court's holding that the passengers could recover; in *Evangelinos* the court reversed the district court's ruling that the passengers could not recover.

[9] Warsaw Convention, *supra* note 5, art. 17, 49 Stat. at 3018, T.S. No. 876 at 21, 137 L.N.T.S. at 23.

[10] Agreement CAB 18900, 31 Fed. Reg. 7,302 (1966). *See* text accompanying notes 20-24 *infra*.

[11] The only other circuit court deciding a terrorist attack case under article 17 of the Warsaw Convention denied recovery. Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), *aff'g In re* Tel Aviv, 405 F. Supp. 154 (D.P.R. 1975). *See* text accompanying notes 72-75 *infra*.

[12] Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 218 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

ternational air travel. Arriving passengers presented their tickets at the TWA check-in counter. After receiving their boarding passes, baggage checks, and seat assignments they were directed to the passport and currency control stations. They then moved to the international transit lounge on the field level section of the airport. Passengers generally may not return to the terminal proper once they have entered the transit lounge.[13] In due course the TWA ground attendants advised the passengers over the public address system that the flight was ready for departure. The passengers formed one queue for men and one for women for the physical searches required by the Greek police before they were allowed to board a bus provided to carry them across the runway to the idling aircraft some one hundred yards away.[14] A lucky few had already been searched and were on their way to the bus, operated by Olympic Airways not by TWA, when the terrorists attacked and pandemonium erupted.[15] The helpless passengers standing in line were easy targets. The result was terrible injury and loss of life leading to the tort litigation in the United States. Because recovery in both cases resulted from the strict liability provisions of the Warsaw Convention, it is useful to discuss the treaty before directly analyzing the cases.

B. *The History of Strict Liability Under the Warsaw Convention*

During the infancy of commercial air travel the international community recognized the need for coordinated control over this hazardous, multinational industry. Lawyers, diplomats, and businessmen proposed to establish baseline controls through a multilateral treaty. After the technical preparation was completed by a committee of aviation experts in 1929, an international air law conference convened at Warsaw. The two primary goals of the meeting were to standardize relevant documentation (e.g., tickets, waybills) and claims procedures, and to limit the

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[13] *Id.* at 219.

[14] *Id.* at 219-20.

[15] Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95, 98 (W.D. Pa. 1975), *rev'd*, 550 F.2d 152 (3d Cir. 1977) (en banc). An unexpected scheduling quirk added cruel irony to the irrationality of the assault. The terrorists intended to strike passengers on TWA's flight 881 to Tel Aviv. The passengers actually attacked were for the most part ticketholders on TWA's flight 881 to New York. An airport employee mistakenly manipulated the electronic sign above the gate to indicate wrongly that the waiting passengers were bound for Tel Aviv. The terrorists were misled by the sign and directed their fire at the wrong group. *Id.* at 97-98.

liability of the air carriers. Limitation of liability was considered especially important because early air travel was intrinsically dangerous and it was feared that heavy tort judgments would stifle the growth of the industry.[16] The resulting agreement, known as the Warsaw Convention, essentially achieved both goals. The treaty protected injured passengers by creating a rebuttable presumption of liability on the part of international air carriers under certain circumstances. Article 20(1) excused a carrier from liability upon proof that it had "taken all necessary measures to avoid the damage or that it was impossible for [it] to take such measures."[17] Another provision protected the airlines by limiting liability to 125,000 Poincaré francs (about 8,300 United States dollars),[18] a low limit even in 1929.[19]

In the years following the Convention's ratification international airlines became more fiscally robust. In the United States, where tort damage judgments were often higher than those in the rest of the world, the Convention's limits on recovery for passenger injury were viewed as unreasonably low.[20] After some inconclusive attempts to increase the limits of liability,[21] the United States became sufficiently dissatisfied with the liability limitation to send a notice of denunciation to the Government of Poland as repository of the Convention. The United States indicated that it would withdraw from the Convention in six months unless the world's airlines agreed to raise the liability limits.[22] This extraordinary pressure by the treaty's most important signatory proved effective. United States withdrawal from the Warsaw Convention was prevented by a spate of hasty consultations between United States representatives and agents of the world's international air carriers. The compromise, known as the Montreal Agreement, is a private compact be-

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[16] *See, e.g.*, Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-501 (1967). This article offers an excellent discussion of the history of the Warsaw Convention and its subsequent modifications up to the Montreal Agreement.

[17] Warsaw Convention, *supra* note 5, art. 20, 49 Stat. at 3019, T.S. No. 876 at 22, 137 L.N.T.S. at 24.

[18] *Id.* art. 22(1), 49 Stat. at 3019, T.S. No. 876 at 22, 137 L.N.T.S. at 25.

[19] Lowenfeld & Mendelsohn, *supra* note 16, at 499-500.

[20] *See* Very, *The Guatemala City Protocol of 1971: The Warsaw Convention Revisited: Should the United States Ratify?*, 124 PITT. L.J. 3, 4 (1976).

[21] In 1955 a conference held at The Hague produced a Protocol that raised the limits of the carrier's liability under the Convention to around $16,600. The United States did not ratify the Protocol. Very, *supra* note 20, at 4-6. *See also* Lowenfeld & Mendelsohn, *supra* note 16, at 504-16; Mankiewicz, *Hague Protocol to Amend the Warsaw Convention*, 5 AM. J. COMP. L. 78 (1956).

[22] 53 DEP'T STATE BULL. 923 (1965).

tween the air carriers and the United States Government controlling international transportation involving a location within the United States.[23] The limits of liability for passenger recovery under the Warsaw Convention were raised to $75,000 including legal fees, or $58,000 in the case of a claim brought in a jurisdiction that provides for a separate award of legal costs. Furthermore, the rebuttable presumption of liability was discarded in favor of strict liability. The airlines waived the defense of due care provided by article 20; consequently, the air carriers are now strictly liabile up to a $75,000 limit for any injury covered by the Warsaw Convention.[24]

C. *Article 17 and the Terrorist Attack Strict Liability Rationale*

Article 17 of the Warsaw Convention sets out the circumstances under which airlines are required to compensate injured passengers. The article reads:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[25]

The article does not create a cause of action but merely establishes a presumption of liability under the applicable substantive

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[23] The United States formally withdrew its notice of denunciation on May 14, 1966, noting the approval of the Montreal Agreement by the Civil Aeronautics Board. 54 DEP'T STATE BULL. 955 (1966).

[24] There has been a move to incorporate the Montreal changes, especially strict liability, into the actual Convention. In 1971 a protocol was developed at Guatemala City that would provide for absolute liability on the airlines' part, an absolute limit of liability to $100,000 and changes in the notice requirement on tickets and baggage checks. Very, *supra* note 20, at 8-12. The Guatemala City Protocol was signed on behalf of the United States Government on March 8, 1971, but has not yet been ratified by the Senate. *Id.* 3. The protocol is, like the Montreal Agreement, a plaintiff-oriented extension of liability. *See, e.g.*, Boyle, *A Response to Lee Kriendler*, 6 AKRON L. REV. 141 (1973).

Because the Guatemala Protocol has not been ratified the plaintiffs' theory for recovery in *Day* and *Evangelinos* was based on strict liability under the Warsaw Convention as modified by the Montreal Agreement. For a more comprehensive discussion of the complex and convoluted bargaining which surrounded the denunciation of the Convention and subsequent creation of the Montreal Agreement, see Lowenfeld & Mendelsohn, *supra* note 16, at 546-602; Very, *supra* note 20, at 6-8; *The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. AIR L. & COM. 243 (1966).

[25] Warsaw Convention, *supra* note 5, art. 17, 49 Stat. at 3018, T.S. No. 876 at 21, 137 L.N.T.S. at 23.

law.[26] It was this presumption of liability for injuries sustained while embarking that formed the basis of the courts' decisions in *Day* and *Evangelinos*.

The decisions in *Day* and *Evangelinos* that the injuries sustained in the Hellenikon Airport attack were within the ambit of article 17 of the Warsaw Convention operated to hold TWA strictly liable. In *Day* the Second Circuit found no difficulty in construing terrorist attacks as accidents within the meaning of the Warsaw Convention.[27] The only remaining issue to be resolved was whether the passengers in fact sustained their injuries "in the course of . . . the operation of embarking."[28] TWA argued that liability under the Warsaw Convention should not attach while the passenger is inside the terminal building.[29] The *Day* court rejected this "location of the injury" test in favor of an "activity" approach for determining what are the operations of embarking. Using the district court's detailed list of steps the passengers took between their arrival at the airport and the terrorist attack,[30] the court concluded that where the passengers had completed five out of eleven essential steps they were indeed within the course of embarking.[31]

The court gave three reasons supporting this finding. First, the passengers were embarking because they were acting at the express direction of TWA's agents;[32] the unwritten corollary was that TWA should therefore be responsible for their safety. Second, a broad construction of article 17 was "in harmony with modern theories of accident cost allocation" because airlines were in a better position than individual passengers to "persuade, pressure or, if need be, compensate airport managers to adopt more stringent security measures against terrorist

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[26] Maugnie v. Compagnie Nationale Air France, No. 74-2672, slip op. at 2 n.2 (9th Cir. Jan. 19, 1977).

[27] Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

[28] *Id.*

[29] *Id.*; TWA presented the same argument in *Evangelinos*. Brief for Defendant Appellee at 10-43, Evangelinos v. Trans World Airlines, Inc., No. 75-1990 (3d Cir. May 4, 1976), *aff'd on rehearing*, 550 F.2d 152 (3d Cir. 1977) (en banc).

[30] Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 221-22 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). According to the district court the passengers could not board the plane unless they: 1) presented their tickets at the TWA check-in counter; 2) secured boarding passes; 3) obtained baggage checks; 4) were assigned seats; 5) passed through passport and currency control; 6) were searched by the Greek police; 7) had their carry-on baggage searched; 8) walked to the bus; 9) boarded the bus; 10) rode the bus to the waiting plane; 11) boarded the plane.

[31] *Id.*

[32] *Id.* at 33-34.

attacks."[33] Finally, liability should attach under the Warsaw Convention because administrative costs under the Convention would be lower than the available alternatives, thereby lessening the burden on injured plaintiffs and survivors.[34]

The district court in *Evangelinos* rejected the "activity" test of *Day* because "it extends the liability of the signatories to the Montreal Agreement under the Warsaw Convention far beyond anything that was within the contemplation of the parties."[35] On an interlocutory appeal to the Third Circuit[36] the decision was reversed. The appellate court adopted the Second Circuit's "activity" approach and refined the test on rehearing to one focusing on "the location of the accident, the activity in which the injured person was engaged, and the control by defendant of such injured person."[37]

The court majority agreed with the result in *Day* but stated that its reasoning "differs slightly."[38] The opinion acknowledged the desirability of an "easily predictable rule"[39] but rejected TWA's proposed "location" approach as "too arbitrary and too specific."[40] The court argued that if liability under article 17 were to attach only outside of air terminal buildings as TWA proposed, future cases of a similar nature might have "differing results resting solely on the fortuity of where passengers are placed at the time of injury."[41] In light of its finding that "TWA has assumed control over the group [of passengers waiting to board] and caused them to congregate in an area and formation directly and solely related to embarkation on Flight 881,"[42] the court reasoned that "TWA had begun to perform its obligation as air carrier under the contract of carriage . . . . Thus, for all practical purposes, 'the operations of embarking' had begun."[43]

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[33] *Id.* at 34.

[34] *Id.*

[35] Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95, 102 (W.D. Pa. 1975), *rev'd*, 550 F.2d 152 (3d Cir. 1977) (en banc).

[36] Because this issue was one of first impression for both the Third Circuit and the Supreme Court, a district court order dated June 26, 1975 certified the appeal pursuant to 28 U.S.C. § 1292(b) (1970). Evangelinos v. Trans World Airlines, 550 F.2d 152, 153 (3d Cir. 1977) (en banc).

[37] *Id.* at 155.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 157.

[42] *Id.* at 156. In its earlier opinion, before it made explicit its location-control-activity test, the Third Circuit said simply that "TWA had assumed control over the group." Evangelinos v. Trans World Airlines, Inc., No. 75-1990, slip op. at 6 (3d Cir. May 4, 1976), *aff'd on rehearing*, 550 F.2d 152 (3d Cir. 1977) (en banc).

[43] *Id.*

Chief Judge Seitz wrote a vigorous dissent, arguing that the Warsaw Convention covered only the special and unique risks inherent in air travel. The dissent posited that terrorist attacks within terminals were not inherent air-travel risks and were therefore beyond the scope of article 17's coverage.[44] Chief Judge Seitz believed that other decisional law, both foreign and domestic, mandated this interpretation.[45] Furthermore, his reading of the Convention minutes and applicable commentaries dictated that embarking be confined to the actual boarding of the plane or trip across the traffic apron.[46] Finally, he took issue with the majority's location-control-activity analysis,[47] and protested that it was inappropriate to graft modern tort theories of risk-spreading and accident cost allocation onto a treaty drafted without reference to such purposes.[48]

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[44] Certain dangers, such as the danger of skyjacking, are encountered once the passenger has boarded the aircraft. Obviously, the threat of skyjacking is not a substantial risk borne by passengers within the terminal. Hence, while skyjacking has been loosely labeled as a risk associated with air travel . . . it is evident that such activity creates a risk only to those situated as to be exposed to the danger.

Like skyjacking, sabotage or terrorist activity may pose a threat to passengers boarding or on board an aircraft. To this extent, I agree that terrorism is a risk which accompanies international air travel. I am unable to agree, however, that this particular hazard is an incidental risk of air travel when it occurs within the confines of an airport terminal. Rather, in my view, a terrorist attack inside an airport is no more likely than the bombing of a restaurant, bank or other public place. Accordingly, I believe the majority's conclusion that plaintiffs were injured as a result of a risk inherent in modern air travel is unwarranted. The particular hazards of terrorism which are unique to air navigation are simply not risks to which passengers in plaintiffs' proximity were exposed.

Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 159-60 (3d Cir. 1977) (Seitz, C.J., dissenting).

[45] *Id.* at 160.

[46] *Id.* at 160-63.

[47] *Id.* at 163-64. Chief Judge Seitz' rebuttal of the argument that TWA was liable under the "control" theory stressed the non-objective and result-oriented aspects of that test. He stated:

It is equally clear, however, that passengers at many locations within the terminal are also, to a large extent, under the control of the airline. The majority's control analysis is therefore, at best, imprecise. In apparent recognition of the over-inclusiveness of its control classification, the majority seeks to impose yet another restriction on the class of persons who are entitled to recover under Article 17, namely, membership in an identifiable group associated with a particular flight and located within a specific geographical area designated by the airline. In effect, however, this additional restriction elevates location to a position of critical importance. Control becomes a mere artifice to permit recovery within the terminal, yet under limited circumstances.

Id. at 164.

[48] *Id.* at 163.

D. *Judging the Appropriateness of Strict Liability*

By the use of the unspecific terms embarking and disembarking the authors of article 17 declined to define with certainty the full extent of an international air carrier's responsibility for the safety of its passengers.[49] Courts are thus forced to

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[49] The history of article 17 indicates that it was a compromise written to satisfy two groups of delegates to the original convention. The technical experts (The Comité Internationale Technique d'Experts Juridique Aériens—CITEJA) presented a draft for the delegates' approval proposing that liability should be imposed on the airlines from the moment the passengers arrived in the airport of departure until they left the airport of destination. The CITEJA version of article 20 read:

> The period of carriage for the application of the provisions of the present chapter extend from the time when the passengers, goods or baggage enter the airport of departure until the time when they exit from the airport of arrival; it does not cover any carriage whatsoever outside the limits of an airport, other than by aircraft.

II Conférence internationale de Droit Privé Aérien, 4-12 Oct. 1929 (Warsaw, 1939), *reprinted in* Brief for Defendant-Appellee, *supra* note 29, at 15. Some delegates opposed this phraseology because they believed that the law should not impose on the airlines duties outside their sphere of control. These delegates proposed instead that liability should not attach until the passengers were actually inside the airplane. *Id.* at 17-20. The dissenters' arguments were convincing enough to defeat the proposed aerodrome-to-aerodrome liability. *Id.* at 57 app. The view that liability should attach only when the passengers had actually boarded the aircraft did not prevail either. The problem was referred to the drafting committee, which produced the compromise language of article 17. *Id.* The compromise language created the difficulty in application and inconsistency of result that would follow. Even before the drafting committee had produced the actual middle-of-the-road text of article 17, the convention reporter prophesied a problem that became one of the core concerns in cases arising from airport terrorist attacks. He complained: "I point out again that this last solution, in reality, is not [a solution] and doesn't help anything at all, because a judge will always still have to specify the exact moment when the carrier's liability begins." *Id.* at 56 app.

An examination of the scholarly literature sheds little more light on the meaning of these terms. Prior to *Day* and *Evangelinos* no writer expressly considered the problems in applying article 17 to terrorist attacks on airports. However, some legal literature suggested that such accidents would be beyond the contemplation of article 17. In 1936 one scholar wrote:

> If the airport waiting-room is maintained by the carrier, is an injury sustained therein by a passenger within the terms of the Convention? The passenger is present there for the purpose of embarkation. But again the purpose of the Convention must be considered; no hazard peculiar to air navigation has been encountered. To permit the air carrier to limit his liability as a waiting-room operator would be a discrimination against every other operator of railway or bus passenger stations.

Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. 1, 20-21 (1936). In the late 1930's, there were two interpretations of the scope of article 17 liability. The broad interpretation fixed liability at the point when the passenger leaves the terminal to board the waiting plane; the narrow view would limit coverage to the actual entering and exiting the aircraft. Brief for Defendant-Appellee, *supra* note 29, at 39. In his *Evangelinos* dissent Chief Judge Seitz pointed out that under either of these interpretations the plaintiffs would lose. Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 162-63 (3d Cir. 1977) (Seitz, C.J., dissenting).

construe the ambiguous phrase "in the course of any of the operations of embarking or disembarking" with reference to various policy justifications for different constructions. In the airport terrorist attack cases the basis of decision must provide for (1) a construction compatible with prior interpretations of the intent of the treaty signatories; (2) precise definition of terms for future reference; (3) fair balancing of the costs of injury; and (4) deterrence of future attacks. Unfortunately, the *Day* and *Evangelinos* decisions fail to meet these exacting criteria.

1. The Unsupported Departure From Prior Case Law

Although the drafting history of article 17 may be inconclusive as to the precise definitions of embarking and disembarking,[50] the *Day* and *Evangelinos* courts were not without recourse to precedents interpreting and applying the terms. In each of these prior cases the reach of article 17 was limited to the risks inherent in air transportation. These risks were confined to those activities in close temporal and spatial proximity to the special services of the air carrier. This construction is not surprising in light of the particular concern of the Warsaw Convention signatories with the added risks of air travel. What is surprising is how superficially the *Day* and *Evangelinos* courts distinguished this uniform body of precedent.

The TWA defense in the Hellenikon litigation relied heavily on *Maché v. Air France*,[51] an article 17 case decided by France's highest court, the *Cour de Cassation*. TWA urged the courts to take special note of *Maché* because it was decided by a "French court, interpreting a treaty drafted and debated in its own

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It is hardly likely, however, that the pre-Hellenikon commentators considered the possibility of injuries sustained in the terminal as the result of a terrorist attack. As late as 1972 attention was still focused only on skyjacking. Abramovsky, for example, wrote:

> If these actions may be said to fall within the wording of the Montreal Agreement, a passenger would not be required to prove negligence on the part of the airline before he could collect since the Agreement promulgates an absolute liability standard. All he would have to do is show that he was on the plane when the hijacking occurred, and prove the extent of his damages up to $75,000.

Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFFALO L. REV. 339, 353 (1972). It might be unfair to read into these commentators' words instructions for coping with situations they never imagined. It does seem fair, however, to note that the majority view in article 17 scholarship points away from imposing liability on airlines for injuries sustained in a terminal departure lounge.

[50] *See* note 49 *supra*.

[51] Judgment of June 3, 1970, Cass. Civ. 1re, 24 R.F.D.A. 311 (1970).

language."[52] However, in the interpretation of a multilateral convention where no nation's delegates dominated the writing of articles and where precise translations are available, there is no compelling reason to give special attention to the construction of any particular tribunal.[53] Nevertheless, even if *Maché* is not entitled to exaggerated deference, it does represent a strong adverse precedent not adequately distinguished by the courts imposing article 17 liability in the Hellenikon cases. The plaintiff in *Maché* sustained personal injuries when, led by two Air France stewardesses, he took a shortcut through an area located beyond the traffic apron but not inside the terminal building. The court held that the plaintiff had completed the operations of disembarking when he stepped off the traffic apron. The *Maché* court clearly limited the scope of disembarking to passage across the runway. The French Court of Appeals said: "[I]f the Warsaw Convention regulates, among others, accidents arising on the ground, in the course of the operations of embarking or disembarking, it is only to the extent that these operations are taking place on the traffic apron . . . ."[54] Although there may be no convincing argument that the lines of article 17 liability must be drawn at the traffic apron's edge, *Maché* is nonetheless an attractive precedent in the Hellenikon cases because of the similarity of the paths traveled by the passengers in each case. In each situation they traveled between the terminal and the aircraft by crossing the paved runway, and in both cases the passengers were injured at a point beyond the runway. The French court's reason for holding that disembarkation ceases at the traffic apron was that beyond that point passengers are no longer exposed to the risks inherent in air transportation.[55] The court stated that the Warsaw Convention did not apply absent exposure to such risks and that beyond the traffic apron ordinary tort law should control.[56]

Neither *Day* court mentioned *Maché* in its opinion. The appellate decision in *Evangelinos* tried to distinguish *Maché*. Besides asserting that *Maché* was a disembarkation case and therefore

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[52] Brief for Defendant-Appellee, *supra* note 29, at 28.

[53] It should also be noted that the United States Solicitor General has expressed the opinion that any inconsistency of *Maché* with *Day* is "in the nature of dictum." Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 155 n.8 (3d Cir. 1977) (en banc).

[54] Judgment of April 12, 1967, Cour d'Appel, Rouen, 21 R.F.D.A. 343, 345 (1967), *aff'd*, Judgment of June 3, 1970, Cass. Civ. 1re, 24 R.F.D.A. 311 (1970), *reprinted in* Brief for Defendant-Appellee, *supra* note 29, at 3 app.

[55] *Id.*

[56] *Id.*

somehow different, the court noted that the French decision opted against liability because M. Maché was injured in a "safe place," far removed from the hazards inherent in air transportation and because his injury was not of the sort associated with aviation-type risks.[57] Terrorist attacks in the terminal, on the other hand, were viewed by the *Evangelinos* majority as "risks now inherent in air transportation."[58] M. Maché was injured when he fell into a hole at an air terminal construction site.[59] It is difficult to discern why construction at an airport is not an inherent aviation risk but terrorist attacks are. Far more passengers are no doubt exposed to the dangers of air terminal construction than to the violence of terrorist attacks. The *Evangelinos'* majority may be correct that "[t]errorist attacks occur where there are concentrations of people in order to secure maximum publicity."[60] However, the court was too quick in concluding that such attacks "therefore, are common in international airports."[61] The dissent correctly pointed out that equally large groups can be found in a "restaurant, bank, or other public place."[62]

TWA attempted to reinforce the precedential value of *Maché* by citing *MacDonald v. Air Canada*.[63] The plaintiff in *MacDonald* had completed her international flight and walked through the terminal to the baggage-claim area where she fell to the floor and was injured. The court held that the plaintiff's injury had occurred beyond the scope of article 17[64] because she had reached a "safe point inside of the terminal."[65] The *Evangelinos* court found several grounds for distinguishing *MacDonald*. First, the court noted that *MacDonald* involved a disembarking

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[57] Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 156-57 (3d Cir. 1977) (en banc).

[58] *Id.* at 157.

[59] Brief for Defendant-Appellee, *supra* note 29, at 2 app.

[60] Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 157 n.10a (3d Cir. 1977) (en banc).

[61] *Id.*

[62] *Id.* at 159 (Seitz, C.J. dissenting). The majority chose a curious authority for the proposition that airport terrorist attacks are an "inherent" air travel risk. The opinion cited *In re* Tel Aviv, 405 F. Supp. 154 (D.P.R. 1975), *aff'd sub nom.* Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), a case that denied recovery under article 17 to plaintiffs in a terrorist attack case. Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 157 n.10a (3d Cir. 1977) (en banc).

[63] 439 F.2d 1402 (1st Cir. 1971). *See also* Klein v. KLM Royal Dutch Airlines, 46 App. Div. 2d 679, 360 N.Y.S.2d 60 (1974).

[64] There was an alternative holding of insufficient evidence that an "accident" had occurred. 439 F.2d at 1404-05.

[65] *Id.* at 1405.

passenger,[66] and it noted the alternative holding that no "accident" occurred.[67] The court also applied the tripartite test of location, control, and activity, concluding that the Hellenikon victims had not reached a place safe from risks inherent in aviation.[68] It is again difficult to see why falling down in a baggage-claim area is not an inherent aviation risk but injury in a terrorist attack is. One would expect more cases of injury in airport buildings by falls than by gunfire.

Furthermore, the *Evangelinos* majority distinguished *MacDonald* on the ground that the plaintiff there "was in no sense under the control of the airline or acting as a part of a group under direct airline supervision."[69] This distinction is not realistic. Those who are waiting to retrieve baggage are under the airline's control to the extent that airline employees tell them where their bags will appear, how to retrieve the bags, and how to file claims for lost or damaged items. The control exerted by TWA independent of the Greek police was hardly more than the direction provided by Air Canada to its arriving passengers.[70] In sum, the *Evangelinos* court did not adequately distinguish *MacDonald*.

In a case growing out of the Lod Airport attack,[71] *In re Tel Aviv*,[72] passengers shot while attempting to retrieve their baggage in the terminal were ruled to be no longer in the course of any of the operations of disembarking;[73] thus, the Warsaw Convention's strict liability did not apply. The district court went beyond this holding by stating that: "The legislative history, however, makes clear that in drafting Article 17, the delegates to the Convention specifically intended to exclude from coverage accidents occurring to passengers inside an airport terminal building."[74] This reading of the Warsaw Minutes is certainly not implausible.[75] In fact, to the extent that the distinction between

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[66] *See* text accompanying note 81 *infra*.

[67] Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 156 & n.10 (3d Cir. 1977).

[68] *Id.* at 157.

[69] *Id.* at 156 n.10.

[70] The court apparently acknowledged that the authority of the TWA employees was subordinate to that of the Greek police when it stated that the pre-boarding searches "were required and conducted by the Greek Government and were prerequisites of being permitted to leave the airport by plane." *Id.* at 153 n.5.

[71] *See* text accompanying note 1 *supra*.

[72] 405 F. Supp. 154 (D.P.R. 1975), *aff'd sub nom.* Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976).

[73] 405 F. Supp. at 158.

[74] *Id.* at 157.

[75] The district court said:

hazards due to the special risks of flight and other hazards is emphasized, this view is probably more consistent with the concerns of the original draftsmen than are those of the Second and Third Circuits.

Another court limited the reach of article 17 in *Felismina v. Trans World Airlines, Inc.*[76] The plaintiff in *Felismina* exited the aircraft, entered the terminal, and was injured on an escalator. The court declined to apply article 17 because it found that the plaintiff had completed the operations of disembarking.[77] Neither of the Hellenikon appellate decisions mentioned *Felismina*, but the district court in *Day* distinguished the case by noting that the airline did not require the plaintiff to go through any routinized steps to deplane.[78] The absence of a disembarking regimen did not contribute to the findings in *Felismina*, however. There the court said only that "by the time plaintiff had boarded the down escalator, she had disembarked from defendant's aircraft."[79] The court may well have concluded that the location of the accident was so removed from the aircraft that plaintiff could no longer be considered disembarking.

It is clear from the discussion of the prior case law that the decisions of the Second and Third Circuits in the Hellenikon cases were a marked departure from previous holdings. Further, the *Day* and *Evangelinos* decisions did not adequately explain why article 17 liability should be imposed on the airlines for injury in the terminal when it was not imposed by other courts in analogous fact situations. The judiciary ought to strive for consistency, regularity and predictability in its application of any law. These goals are particularly important in the interpretation of a multinational treaty because differing results in this context may compound the confusion already likely to exist among the many legal systems involved.[80] The attempts of the courts de-

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> Whatever uncertainties there may be as to the precise line drawn by Article 17, the above legislative history indicates plainly that the intent of the Warsaw Conference in rejecting the CITEJA draft and in declining to impose in Article 17 the same extent of carrier liability for passengers as that provided by Article 18 for goods and baggage was clearly to exclude liability as to passengers for accidents which occur after the passenger "has reached a safe point inside the terminal," and "which are far removed from the operation of aircraft."

Id. (quoting MacDonald v. Air Canada, 439 F.2d 1402, 1405 (1st Cir. 1971)).

[76] 13 Av. Cas. 17,145 (S.D.N.Y. 1974).

[77] *Id.*

[78] 393 F. Supp. at 223.

[79] 13 Av. Cas. at 17,145.

[80] Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 155 (3d Cir. 1977) (en banc); Block v. Compagnie Nationale Air France, 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) ("A multilateral treaty is rather like a 'uniform law'

ciding the Hellenikon cases to distinguish adverse precedent demonstrates the dangers in superficial analysis. For example, the courts made much of the fact that the Hellenikon situation involved emarkation rather than disembarkation. Although the process of disembarkation may often be somewhat less structured than the steps comprising embarkation, they are essentially the same. Both embarking and disembarking passengers move about the terminal or the runway with limited autonomy. They must obey the instructions of the carrier's agents or of local officials if they are to avoid delay and confusion.

The draftsmen of the Warsaw Convention analogized the two activities and dealt with them within a single phrase of article 17. Since they distinguished the embarkation of baggage from the embarkation of passengers,[81] the draftsmen presumably would have treated embarkation and disembarkation differently if they had intended differing standards for the imposition of liability. Consequently, the assertion that embarkation cases are inherently distinguishable from disembarkation cases unjustifiably separates the components of a phrase designed to be read as a unitary concept. Decisions interpreting either portion of that phrase ought to form a consistent body of law. Thus, TWA's disembarkation precedents can properly be distinguished from the Hellenikon cases only if their fact patterns differ in respects other than the embarkation-disembarkation distinction.

2. Failure to Define Embarkation

Another weakness of the *Day* and *Evangelinos* decisions is their failure to articulate a clear and predictable definition of the elusive terms embarking and disembarking. When it was proposed that the terms of the Montreal Agreement be made official in the Guatemala Protocol,[82] some commentators pointed

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within the United States. The court has an obligation to keep interpretation as uniform as possible.").

[81] Article 18 provides different stipulations for liability in the transportation of baggage than article 17 sets up for passengers. Article 18 reads in part:

> (1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage took place during the transportation by air. (2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

Warsaw Convention, *supra* note 5, art. 18, 49 Stat. at 3019, T.S. No. 876 at 21, 137 L.N.T.S. at 18.

[82] *See* note 24 *supra*.

out the desirability of clarifying the meaning of the crucial terms:

> If—as has been proposed by the Legal Committee of ICAO—the rule of liability should apply also to damage sustained in the course of any of the operations of embarking or disembarking, it would seem advisable to define clearly and unequivocally when and where embarkation begins and disembarkation ends.[83]

The same writer's prediction of difficulties in applying article 17 seems almost prescient:

> Where and when does embarkation begin? At the moment a passenger enters the downtown booking office of the carrier where—according to the ticket—the passenger may report for the flight? Does embarkation include the ground transport to the airport arranged by the carrier, or does it begin only when the passenger enters the airport terminal building (which may or may not be owned by the carrier) or when he reports to the carrier's servant or agent at the counter? Or does it begin at any stage of the passenger's movements between the counter and the parked aircraft? The same questions can be asked about the meaning of the term disembarkation.[84]

The greatest effort by either of the Hellenikon appellate courts to define embarkation clearly came in the en banc opinion in *Evangelinos*. There the court expressly acknowledged the desirability of devising "an easily predictable rule as to when liability attaches."[85] However, the most specific test the court felt justified in formulating was its trilogy of three crucial factors —location, activity, and control. Such a test falls well short of being "clear and unequivocal" and contributes little in the way of predictability. It is impossible to tell what mix of the three factors is sufficient to trigger liability. The court further complicates the analysis with language recognizing the interdependence of these factors: "While control remains at least equally as important as

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[83] Heller, *Notes on the Proposed Revision of Article 17 of the Warsaw Convention*, 20 INT'L & COMP. L.Q. 142, 146 (1971).

[84] *Id.*

[85] Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 155 (3d Cir. 1977) (en banc).

location and activity, it is an integral factor in evaluating both location and activity."[86]

The courts should have more seriously considered the possible advantages of other, more predictable tests[87] before deciding to adopt an unspecific approach focusing in varying degrees on location, control, and activity.

TWA's proposed test, for example, provided that, while inside the terminal building, passengers could never be embarking or disembarking within the meaning of article 17.[88] Adoption of this test would have the advantage of clarity for future use, drawing an unmistakable line at the door of the terminal building. Furthermore, it has some support in the legislative history of the Convention—apparently some of the delegates thought they were establishing a rule of no liability inside the aerodrome.[89]

A second possible test would provide that passengers can be embarking or disembarking only when they are within the exclusive control of the airline or its agents. This test would be a refinement of a concern touched upon in the *Day* and *Evangelinos* opinions.[90] However, application of the exclusive control test would produce questionable results in some article 17 cases. In the Hellenikon cases the airline would not be held liable because the passengers were partly under the control of the Greek police. However, the airline would be liable for M. Maché's injury because he was acting at the direction of two stewardesses when he fell. These results arguably disrupt the uniformity desirable in the application of the Warsaw Convention.[91]

A third test could be developed from the logic of *Maché*. This approach would mandate that the operations of embarking

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[86] *Id.*

[87] The Ninth Circuit recently declined an opportunity to adopt a bright-line test for embarking and disembarking, stating that "since the Convention drafters did not draw a clear line, this Court is also reluctant to formulate an inflexible rule." Maugnie v. Compagnie Nationale Air France, No. 74-2672, slip op. at 9 (9th Cir. Jan. 19, 1977). Rather, the court announced a "total circumstances" test, *id.*, and held that an injury sustained when the passenger slipped in an Orly Airport corridor on her way from defendant's flight to a connecting flight did not come "in the course of . . . disembarking." *Id.* at 10.

[88] Brief for Defendant-Appellee, *supra* note 5, at 25.

[89] II Conférence Internationale de Droit Privé Aérien, 4-12 Oct. 1929 (Warsaw, 1939), *reprinted in* Brief for Defendant-Appellee, *supra* note 5, at 57 app.

[90] *See* Evangelinos v. Trans World Airlines, Inc., 550 F.2d at 155; Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (3d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

[91] *See* note 80 *supra* & accompanying text.

and disembarking mentioned in article 17 can only be operations that expose passengers to the unique dangers of air travel. This test could not resolve the question whether a terrorist attack is an inherent aviation risk but it could be used in combination with a list of necessary criteria for identifying such risks—for example, proximity to aircraft or flight equipment. A passenger would be embarking or disembarking for article 17 purposes only when within reach of these dangers.

A combination of the three tests discussed above is also a possibility. A combination test would restrict liability to events outside of the terminal, under the exclusive control of the airline, and within the ambit of inherent aviation risks.

Perhaps the most intriguing suggestion proposed to solve the dilemmas of article 17 cases is that of Heller,[92] who felt that while absolute liability might be fair for accidents which occur in flight,[93] it was inappropriate in embarkation and disembarkation cases not involving exposure to aviation-type risks.[94] In the latter types of cases the airline would retain a defense under article 20 amended to read as follows:

> In the carriage of passengers the carrier shall not be liable for damage occasioned in the course of any preflight or post-flight operations or in the course of any of the operations of embarking or disembarking, or for damages occasioned by delay, if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.[95]

Whether or not any of the above-mentioned alternatives is wholly satisfactory, each is superior to the ambiguity of the loosely structured tests in *Day* and *Evangelinos*.

3. Weaknesses of the Risk-Spreading Rationale

While the Third Circuit did not expressly consider the concept of risk-spreading in the *Evangelinos* opinion, the Second Circuit in *Day* suggested that the air carrier should pay for the passengers' injuries because it would be preferable to allocate the

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[92] *See* note 83 *supra*.

[93] Heller proposed that the carrier be strictly liable only for damage sustained "in flight." The definition of "in flight" was to be adopted from article 1 (2) of the Rome Convention of 1952 (covering damage caused by foreign aircraft to third parties on the surface). Heller, *supra* note 83, at 146.

[94] *Id.*

[95] *Id.* at 148.

costs of the terrorist attack among the total population of air travelers rather than to require the victims to bear the expenses alone.[96] Although this analysis finds some support in the legal commentary,[97] it may be argued that the judiciary should exercise considerable restraint in expanding the scope of article 17 to cover essentially unforeseen situations. Chief Judge Seitz made this point quite eloquently in his *Evangelinos* dissent. After noting the Second Circuit's support for an expansive reading of the article as a means of forcing the airlines to distribute accident costs among all passengers, he explained why such a conclusion was unacceptable:

> While I do not question the soundness of these [risk-spreading] principles in appropriate contexts, I believe that the explicit goals and policies which were voiced by the delegates to the Warsaw Convention and reaffirmed by the signing of the Montreal Agreement in 1966 foreclose reference to them in defining the scope of Article 17. Had the signatories to the Convention wished to amend it in order to reflect modern developments in American tort law, they could have affirmatively acted in 1966 when the monetary damage limitation was increased and the airline's due care defense was eliminated. Their failure to do so should not be disregarded, particularly if we keep in mind that this is an international agreement.[98]

Notwithstanding the force of this historical argument, optimal risk-spreading may still be a proper consideration in the interpretation of article 17 but liability should not be imposed on this ground without a thorough evaluation of the equitable and practical consequences.[99] The Hellenikon courts, however, al-

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[96] 528 F.2d at 34.

[97] *Cf.* Abramovsky, *supra* note 49, at 359. Discussing the analagous situation of aircraft hijacking Abramovsky suggests that:

> Perhaps the knowledge that substantial judgements would be awarded to hijacked passengers who have suffered serious physical and emotional injuries would assure that such incidents would rarely occur in future times. Furthermore, and just as importantly, an innocent passenger who had suffered through no fault of his own could and would be adequately compensated.

Id.

[98] Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 163 (3d Cir. 1977) (Seitz, C.J., dissenting). It is probably an open question whether the Guatemala Protocol merely reiterates the traditional justifications for the Warsaw Convention or in fact embraces the cost-spreading theories that some view as inseparable components of strict liability.

[99] Courts often do not take the long view but may be swayed by an appealing

lowed concern for the financial burdens of injured passengers to divert their attention from the question of who should compensate them. The *Day* court mentioned the "crushing burden" of costs to the plaintiffs,[100] but none of the tribunals involved in these cases discussed which of the parties was best suited to bear that burden and there was no suggestion that governments might absorb some of the costs of injury. The law cannot make every loss compensable and there is no injustice in requiring passengers to bear responsibility for obtaining insurance to protect themselves and their dependents in the event of unexpected disaster. In light of the available alternatives to carrier liability, the existence of an arguably applicable statute such as article 17 is inadequate grounds for imposing liability on the carrier unless it can be conclusively shown that risk-spreading is best served by such a result.

The court's use of the risk-spreading rationale in *Day* is also ill-adapted because the situation at the Athens airport was not at all analogous to the prototypical strict liability case. For example, in products liability cases the defective product has been under the exclusive control of the manufacturer and a reasonable argument can be made that the manufacturer should have been more careful in the design or construction of the product. In the Hellenikon situation it is doubtful that the airlines could have prevented the terrorist attack. The airport was guarded by the Greek government[101] and the pre-boarding physical searches were required and controlled by the Greek police. TWA should not be strictly liable for the terrorist attack because the Greek government failed in its security responsibilities.[102]

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plaintiff in a particular case. This phenomenon has been noted by Professor Prosser:

> In determining the limits of the protection to be afforded by the law, the courts have been pulled and hauled by many conflicting considerations, some of them ill defined and seldom expressed at all . . . . Often they have had chiefly in mind the justice of the individual case, which may not coincide with the social interest in the long run.

W. PROSSER, LAW OF TORTS 16 (4th ed. 1971).

[100] 528 F.2d at 34.

[101] Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 153-54 nn.5-6 (3d Cir. 1977) (en banc). It should be noted, however, that two TWA security guards were also present. *Id.*

[102] Strict liability for a given act should not be imposed on a party not responsible for preventing it:

> The concept of strict liability, at one time regarded as almost inconsistent with legal principle, has been rehabilitated in response to an overriding social need in a world in which technological development is constantly increasing the range of dangerous activities which those responsible for should be required to assume responsibility for the risks which they involve.

C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 450 (1964). Because airlines

As compared to the private airlines, many national governments are better equipped to disperse the costs of accidents over a broad population. The imposition of liability on governments would merely require them to bear the burden of compensating passengers for the sorts of injuries government police forces and intelligence resources are supposed to prevent. In this regard, the Hellenikon courts should have given greater attention to determining where responsibility for the prevention of terrorist attacks should lie and who should provide compensation when that responsibility is not fulfilled.

A decision that article 17 did not apply in the Hellenikon attack situation would not have left the plaintiffs without a remedy and would have had positive implications for the future. The plaintiffs would have a case in negligence to the extent that TWA was responsible, as they in fact alleged in the district court.[103] If the refusal to impose liability under article 17 were read to imply that governments may be sued if they are negligent in carrying out their airport security responsibilities,[104] then future plaintiffs may sue the more responsible parties and governments may be encouraged to tighten their anti-terrorist measures at terminals. This result would benefit all international air travelers.

The references in *Day* to "crushing" accident burdens and to the urgent needs of the injured individuals[105] suggests that the court may have assumed that corporate defendants have more than ample financial resources. In fact, the pockets of international airlines may not be as deep as the courts seem to think. For example, hijacking has had an adverse financial effect on international air carriers.[106] Hijacking, however, simply com-

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are not responsible for injuries caused by an attack on an airport owned and managed by another party in the same sense that they are responsible for injuries caused by the malfunction of a complex jet engine, strict liability seems theoretically inappropriate in the situation discussed in this Comment. *But see* Note, *Warsaw Convention-Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 FORDHAM L. REV. 369, (1976); Comment, *The Guatemala City Protocol to the Warsaw Convention and the Supplemental Plan under Article 35-A: A Proposal to Increase Liability and Establish a No-Fault System For Personal Injuries and Wrongful Death in International Aviation*, 5 N.Y.U. J. INT'L L. & POL. 313, 336 (1972): "[I]n comparison with the need to make economic provision for injured parties, the fact that carriers may be held liable even though not at fault is insignificant . . . ."

[103] Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95, 96 n.2 (W.D. Pa. 1975), *rev'd*, 550 F.2d 152 (3d Cir. 1977) (en banc); Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 218 n.1 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

[104] *See* text accompanying notes 118-35 *infra*.

[105] 528 F.2d at 34.

[106] Financial interests have also been adversely affected by aircraft hijacking.

pounded the preexisting financial distress of international airlines.[107] If the deep pocket of the airlines is largely illusory, imposition of article 17 liability could conceivably have an adverse effect on their ability to provide international transportation. For example, airlines might decline to fly into destinations where terrorist attacks are likely for fear that their liability to passengers in the event of an attack would be disastrous. The Hellenikon decisions might convince airlines that broad constructions of embarking and disembarking render them liable for so many potential injuries, including those occurring inside terminal buildings, that it might be wiser simply to avoid some destinations altogether. Of course, such a decision would deprive the public in the affected areas of an important mode of transportation.

A careful analysis of the concept of risk-spreading as applied to the Hellenikon attack situation indicates that the courts may have allocated the cost of terrorist attacks to the airlines without fully evaluating their capacity to pay and without considering the equities of imposing this burden. Although protection of the injured passengers is assured, the requirement that airlines bear the expense of attacks which they may well be powerless to prevent could actually lead to a reduction of air service or to an unreasonable drain on the airlines' coffers.

4. Preventing Future Attacks

A fourth weakness in the result of *Day* and *Evangelinos* is that the imposition of liability on the international airlines for airport attacks might cause some nations to relax their airport-security measures in favor of letting the apparently wealthy airlines shoulder the responsibility for preventing the attacks. It is

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> Airline companies fear the loss of passenger revenues and the destruction of or damage to their aircraft. Insurance companies are concerned about an increase in the number of claims by airlines and by, or on behalf of, those members of the flying public who sustain injuries or death.

Abramovsky, *Multilateral Conventions for the Supression of Unlawful Seizure and Interference with Aircraft Part I: The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 381, 384 (1974).

[107] Pan American World Airways, long the pioneer and pacesetter in routes and equipment, lost over $80 million in 1974, its sixth straight year of massive financial reverses, and was forced into increasingly complex and burdensome credit arrangements which by their size alone lose their character as secured transactions. But Pan American was not alone. TWA lost heavily in its international operations (roughly $46 million in 1974), Japan Air Lines, Alitalia and Air France incurred losses in the $80-100 million range, and British Airways, Sabena, KLM, and Olympic among others, also lost large sums, as did a number of the supplemental airlines.

Lowenfeld, *A New Takeoff for International Air Transport*, 54 FOREIGN AFF. 36, 44 (1975).

to be hoped, however, that the governments' interest in promoting tourism and stimulating commerce and foreign investment, as well as an ordinary sense of responsibility, would combine to create an interest in rigorous security measures at international airports. This potential adverse effect of airlines' strict liability is not nearly as troublesome as the three previously discussed.

III. ALTERNATIVE APPROACHES

It has been shown that the expansion of Warsaw Convention strict liability to airport terrorist attacks is an undesirable solution to the problems of deterrence and compensation. This approach has received close attention because it has been successful for two groups of plaintiffs and, consequently, may be widely used in the future. However, there are other possible avenues of legal recourse for plaintiffs and these should be examined. This section will discuss two generally unsatisfactory approaches: international criminal law and carrier negligence. The next section will discuss what this Comment considers to be the best legal approach currently available to deal with airport terrorist attacks: government liability.

A. *International Criminal Law*

There have been some attempts to deter terrorism through international public law.[108] Commentators from the developed world often prefer to regard all terrorist violence, regardless of source or motivation, as criminal activity. Professor Baxter notes: "Above all, we should not allow talk about wars of national liberation and the events in the Middle East to distort our vision. Indiscriminate violence, whether by way of war crimes, attacks on diplomats, seizure of aircraft, or the killing of civilians in third states is and remains unlawful."[109] Many other states, how-

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[108] *See, e.g.*, AERIAL PIRACY AND INTERNATIONAL LAW (E. McWhinney ed. 1971); Abramovsky, *supra* note 106; Hannay, *International Terrorism: The Need for a Fresh Perspective*, 8 INT'L LAW 268 (1974).

[109] Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380, 385 (1974). Other articles from the West reiterate this viewpoint. Typical of this genre is the following statement:

> Where a person commits an act which threatens the stability of other states or undermines the international order, he ceases to be a political offender and becomes a criminal under international law, like the pirate or hijacker . . . . "[A] crime against humanity or the rules of war is of international concern and should not be protected because it happens to have a national political objective."

Dugard, *International Terrorism: Problems of Definition*, 50 INT'L AFF. 67, 78 (1974) (quoting J. Fawcett in *British Year Book of International Law 1958* (1959) at 391).

ever, particularly those in the third world with a history of colonial rule, have been reluctant to embrace any law which might hinder anti-colonial or self-determination struggles.[110] Professor Bassiouni acknowledges: "Clearly, individuals who engage in the kidnapping of industrial persons or diplomats, for purposes of economic extortion or other personal gains, commit a crime. However, when we enter into the field of self-determination and wars of national liberation, the question becomes more difficult."[111]

Because of these fundamental differences of opinion as to how terrorism ought to be treated, the international legal community has been unable to develop a comprehensive program of criminal sanctions to deal with terrorist activity. Of course, even if a satisfactory program were to be developed, it would not compensate the victims. It could, at most, fulfill the deterrence function.

B. *Carrier Negligence*

If the appellate courts had declined to consider the Hellenikon attack within the scope of the Warsaw Convention, the plaintiff's allegations of carrier negligence would have remained.[112] Passengers hurt in airport attacks might be able to make out a convincing case of negligence. At common law common carriers owe their passengers an extraordinary duty of care. The carrier is required to assume an attitude of active vigilance

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[110] Some anti-colonialist states have made their position quite clear:

> Basically, Lebanon, Syria, and the Yemen Republic take an absolutist position on this. Their position is that if you're engaged in a self-determination struggle, whatever that is, you should not be bound by the law of war or other prohibitions of terroristic strategy. There are about 14 other states which take a similar position . . . .

Paust, *An Approach to Decision With Regard to Terrorism*, 7 AKRON L. REV. 397, 398 (1974).

[111] Bassiouni, *Methodological Options for International Legal Control of Terrorism*, 7 AKRON L. REV. 388, 394 (1974). The author sees two ways in which international lawyers can approach terrorism. The first option is to make terrorism an international crime and to establish a transnational enforcement mechanism; the second option is to concentrate on increasing governmental cooperation in regard to extradition for terrorist activities already defined as crimes under domestic law. If the direct approach of the first option were chosen, "terrorism" would have to be defined, a difficult task in light of third world support for some revolutionary struggles.

[112] *See, e.g.*, Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 153 n.3 (3d Cir. 1977) (en banc). The Warsaw Convention was originally designed to limit the liability of airlines, *see* text accompanying notes 16-19 *supra*, and provides the exclusive remedy when it applies. *See* Felismina v. Trans World Airlines, Inc., 13 Av. Cas. 17,145 (S.D.N.Y. 1974) (damages action not barred by Warsaw Convention statute of limitation because Convention was not applicable; clear implication that all claims would be barred if Convention applied).

to ward off potential danger. An Illinois court described this duty as follows:

> Knowledge of conditions which are likely to result in an assault upon a passenger, or which constitute a source of potential danger, imposes the duty of active vigilance on the part of the carrier's agents and the adoption of such steps as are warranted in the light of the existing hazards.[113]

Furthermore, the common law rule may impose liability on the carrier for the criminal acts of third persons.[114]

Applying the rule that passengers are entitled to special protection requires a precise definition of the term "passenger." Courts would have the same fundamental problem in defining where liability begins in applying a common law negligence rule that they now have in applying the Warsaw Convention. Although passengers seems to be a larger class of air travelers than those "in the course of . . . embarking"—a person nominally becomes a carrier's passenger when the ticket is purchased—there is substantial authority that a common carrier's extraordinary duty of care applies only while the passengers are in transit.[115] A plaintiff might extend the application of the special common carrier duty by arguing that the duty should attach as soon as the passenger arrives at the air terminal. It is at this point that the passenger becomes principally involved with the status of being an air traveller. However, courts might be understandably reluctant to broaden the heightened duty of the car-

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[113] Neering v. Illinois Cent. R.R., 383 Ill. 366, 379, 50 N.E.2d 497, 503 (1943). *See also* Sue v. Chicago Transit Auth., 279 F.2d 416 (7th Cir. 1960); Fuller v. Southwestern Greyhound Lines, 331 S.W.2d 455 (Tex. Ct. App. 1960).

[114] [I]t has been held that the special relationship which exists between the common carrier and its passengers imposes a duty upon the carrier to protect its passengers from the wrongful acts of third persons whether they be its employees, fellow passengers or strangers. On numerous occasions courts have held that this duty extends to the protection from fellow passengers who have become inebriated and unruly, from fellow passengers who have threatened violence, and from external criminal attacks by third persons.

Abramovsky, *supra* note 49, at 344 (footnotes omitted).

[115] *E.g.*, Yellow Cab Co. v. Carmichael, 33 Ga. App. 364, 368, 126 S.E. 269, 271 (1925):

> A common carrier of passengers for hire is bound to use extraordinary care and diligence to protect its passengers in transit from violence or injury by third persons; and whenever a carrier through its agents and servants, knows, or has opportunity to know, of a threatened injury to a passenger from third persons, . . . or when the circumstances are such that injury to a passenger . . . might reasonably be anticipated, and proper precautions are not taken to prevent the injury, the carrier is liable for damages resulting therefrom.

rier. Such an extension would be inconsistent with the rationale for imposing the greater duty: the special control which is exercised over the passenger during actual transportation.

Furthermore, even if the courts were to impose the higher duty of care for hazards inside the terminal, recovery would not follow automatically. The plaintiff still must prove a breach of duty. Sufficient proof would require some showing of the airline's awareness of the hazard to passenger safety and some showing of its failure to take reasonable steps to prevent the injury. It is questionable whether any precaution the air carrier might reasonably be expected to take would be effective in thwarting an unannounced attack by determined terrorists. The Hellenikon cases, which involved sudden unexpected attacks, indicate that plaintiffs would have great difficulty proving breach of duty.

An airline might be liable for ordinary negligence in some circumstances, however. For example, if it were shown that the airline recognized its duty to the passengers by hiring private security guards,[116] a claim based on actual negligence is tenable.

Victims of airport terrorist attacks do not have many promising avenues of tort recovery other than negligence. It hardly need be said that an attempt to recover directly from terrorists for their intentional torts is likely to be fruitless.[117]

IV. Imposing Liability on Governments

Many of the world's important airports are owned, managed or effectively controlled by governmental bodies.[118] A more

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[116] Even if the private security guards were independent contractors, the plaintiffs can make a defensible argument: "[If] the hired police officers . . . were acting as independent contractors . . . . the defendant common carrier was not thereby relieved from its liability for the negligence of these officers in not adequately protecting the plaintiff against a foreseeable risk." Quigley v. Wilson Line, 338 Mass. 125, 130, 154 N.E.2d 77, 80 (1958).

[117] "Theoretically, a passenger could institute an assault or battery action against a hijacker. However, in the vast majority of the incidents, such actions would be impractical if not impossiible to commence. Generally, hijackers do not possess sufficient assets to make a tort action worthwhile." Abramovsky, *supra* note 49, at 341-42.

[118] The International Civil Aviation Organization reports:

> Among the ninety-three airports for which information on ownership and management was received, there were no privately owned airports. Without exception, they were under the ownership of a national, provincial and/or municipal government. In seventy-one out of the ninety-three cases, the airport was owned by the national government, the remaining airports being owned by lower levels of government or being under mixed ownership involving more than one level of government.

INTERNATIONAL CIVIL AVIATION ORGANIZATION, ICAO CIRCULAR 115, THE ECONOMIC SITUATION OF INTERNATIONAL AIRPORTS at 1-2 (1973).

equitable result than that reached in *Day* and *Evangelinos* would impose liability on the Greek government rather than TWA. As this Comment has noted,[119] the Greek police were responsible for overall airport security. Furthermore, governments are able to spread the costs of injury over the taxable population. It might be argued that the costs of injuries associated with air travel ought to be borne only by airline passengers. The benefits of air transportation extend to many others, however. The whole community benefits from the profits of tourist spending, foreign commerce and airline supply. The cost of maintaining a well-developed air transportation system, therefore, may be fairly imposed on the population as a whole.

Making the government a defendant in the airport terrorist attack situation would have the further benefit of avoiding the chance result that can occur when terrorists attack a crowd in a terminal. Those injured persons who are ticketed passengers and are embarking can recover under the Warsaw Convention. But those similarly situated persons who are not ticket-holders will be denied recovery. If the government can be sued for failure to protect visitors to its airports, passengers and non-passengers would have equal opportunity for receiving compensation.[120] Of course, the equitable arguments for holding governments liable for terminal terrorist attacks injuries are futile if the result is unreachable under current law. The question is, then, whether governments can be held liable for terrorist attacks.

A. *The Sovereign Immunity Barrier*

In many cases where an individual is contemplating legal action against a government, particularly a foreign government, the bar of sovereign immunity must be confronted.[121] This would be the case if the *Day* and *Evangelinos* plaintiffs had attempted to sue the Greek government. Hellenikon airport is owned by the Greek government and is under the sole manage-

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[119] *See* note 101 *supra* & accompanying text.

[120] *See* Hernandez v. Air France, 545 F.2d 279, 284 (1st Cir. 1976):

> It is likely . . . that nonpassengers would be injured by attacks which occur in locations such as baggage retrieval areas. To give passengers who are so injured a strict liability remedy against the carrier—who, unlike the terminal operator, presumably has no control over the situation—but to relegate the nonpassengers to their remedies under local law, would be odd indeed.

[121] *See generally* J. SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY (1963); Atkeson, Perkins & Wyatt, *H.R. 11315—The Revised State-Justice Bill on Foreign Sovereign Immunity: A Time for Action*, 70 AM. J. INT'L L. 298 (1976).

ment of the Greek Civil Aviation Department.[122] The best course for the injured passengers is to sue the instrumentality of the Greek government in the courts of the United States jurisdiction where the instrumentality does business—ideally, in the plaintiff's home state. It is unclear, however, whether the Greek Civil Aviation Department does any business in the United States.[123] But even if the "doing business" test is satisfied, the common law rule is that the business enterprises of foreign states are immune from suit in courts in the United States. Section 66 of the Restatement (Second) of the Foreign Relations Law of the United States, "Applicability of Immunity of Foreign States," provides:

> The immunity of a foreign state . . . extends to
> (a) the state itself . . . .
> (c) its government or any governmental agency . . . .
> (g) a corporation created under its laws and exercising functions comparable to those of an agency of the state.[124]

To avoid offending other governments by unfair or abusive claims of sovereign immunity, nations often agree by treaty or contract to waive immunity from suit for their business enterprises which operate abroad.[125] In 1951 the United States and Greece entered into a treaty that provides for the typical waiver of immunity for governmental entities engaged in overseas business.[126] Article XIV (5) states:

> No enterprise of either Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other lia-

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[122] Brief for Defendant-Appellee, *supra* note 29, at 4.

[123] Olympic Airways, the "flag" airline of Greece, was for many years under private ownership but is currently operated by the Greek government. It is unclear, however, whether Olympic is operated by the Greek Civil Aviation Department.

[124] RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965).

[125] By consenting to be sued and waiving its immunity, a foreign government or its agency avoids the Restatement result and subjects itself to the jurisdiction of the court, as does a private individual. For a discussion of the effects of waiver, see Flota Maritima Browning de Cuba v. Motor Vessel, 335 F.2d 619, 624-27 (4th Cir. 1964).

[126] Treaty of Friendship, Commerce & Navigation, United States-Greece, Aug. 3, 1951, 5 U.S.T. 1829, T.I.A.S. No. 3057.

> bility to which privately owned and controlled enterprises are subject therein.[127]

This waiver allows airport attack victims to overcome the sovereign immunity barrier and sue the foreign government if that government's responsible agency did business in the United States. For example, if the Greek Civil Aviation Department does business as Olympic Airways in the United States, then persons injured by a terrorist attack in the Athens airport can sue the government of Greece. Of course, the plaintiffs might face some difficulty as to the choice of tort law to be applied—that of Greece or that of the United States.[128]

Furthermore, plaintiffs in an airport terrorist attack situation might have another ground for avoiding the sovereign immunity bar if the Civil Aviation Department did business in the corporate form rather than under its agency appellation. There is authority to support the proposition that a corporation wholly or partly owned by a federal government is not entitled to avail itself of sovereign immunity.[129]

If plaintiffs injured in an airport terrorist attack were to avoid the sovereign immunity problem on one of the above theories, the obstacle would still not be totally removed. Under United States foreign affairs law a waiver of sovereign immunity can be overriden by the State Department.[130] A suggestion by the State Department to the court recommending that the defendant be held immune from suit can result in a dismissal of the complaint. Consequently, the threat of State Department ac-

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[127] *Id.* art. XIV (5), 5 U.S.T. at 1867.

[128] Choice of law in tort actions, particularly where aviation is involved, has become a very confused field. The traditional doctrine, *lex loci delicti*, required the application of the law of the place of the accident. However, some courts are now applying the law of the location which has more "significant contacts," where the "center of gravity" is located, or which is "more protective of claimants." *See* Note, *The Guatemala City Protocol to the Warsaw Convention and the Supplemental Plan Under Article 35-A: A Proposal to Increase Liability and Establish a No-Fault System for Personal Injuries and Wrongful Death in International Aviation*, 5 N.Y.U. J. INT'L L. & POL. 313, 317 (1972). *Cf.* Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964) (decedent's death occurred in Colorado but the application of Pennsylvania law was more appropriate).

[129] *See, e.g.*, The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946); The Uxmal, 40 F. Supp. 258 (D. Mass. 1941); United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929); Coale v. Société Co-opérative Suisse, 21 F.2d 180 (S.D.N.Y. 1921); Molina v. Comisión Reguladora del Mercado, 91 N.J.L. 382, 103 A. 397 (1918); Plesch v. Banque Nationale de la République d'Haiti, 273 App. Div. 224, 77 N.Y.S.2d 43 (1948); Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825 (1940). *But see* Dunlap v. Banco Central del Ecuador, 41 N.Y.S.2d 650 (Sup. Ct. 1943); Bradoford v. Director Gen. of R.R. of Mex., 278 S.W. 251 (Tex. Ct. App. 1925).

[130] *See* Isenbrandsten Tankers v. President of India, 446 F.2d 1198 (2d Cir. 1971).

tion and the general difficulty of overcoming the sovereign immunity barrier make a suit against a government procedurally risky.

B. *Substantive Basis for a Suit Against A Government*

Tourism, trade, investment, communications, diplomatic relations and other forms of international interaction involve the presence of aliens and their interests inside host state jurisdictions. International law requires states to maintain a system of governmental protections for these aliens. A general doctrine of responsibility provides that states must use due diligence to protect both the persons and property of outsiders within their borders and must take effective steps to prosecute persons who commit crimes against foreign nationals.[131] As a consequence of the due diligence rule, aliens injured by third parties should be able to recover from the host government if it fails in its duty to protect them. Therefore, passengers injured by a terrorist attack in a state-owned airport where security is provided by police officials should be able to recover from the host government if their injuries are the result of the government's negligence in providing protection.[132] The circumstances under which an alien may recover from a negligent government are described in section 183 of the Restatement (Second) of Foreign Relations Law of the United States:

> A state is responsible under international law for injury to the person or property of an alien caused by conduct

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[131] *See* Lissitzyn, *Hijacking, International Law and Human Rights*, in AERIAL PIRACY AND INTERNATIONAL LAW 117, 118 (E. McWhinney ed. 1971); Draft, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. 131, 134 (Spec. Supp. 1929):

> Article 11. A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.

[132] Due diligence is a negligence rule; therefore, to hold the state responsible for a terrorist attack the plaintiffs would have to prove fault. Jenks confirms this analysis:

> There was at one time a substantial discussion in the literature of international law of how far international responsibility, particularly in cases of injury or damage to the persons or property of foreigners, was absolute or existed only on proof of fault. The discussion related primarily to the responsibility of the State for injury or damage incurred during revolutionary disturbances; as regards such cases there will now be wide agreement with the view . . . that fault must be proved.

C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 518 (1964).

> that is not itself attributable to the state, if (a) the conduct is either (i) criminal under the law of the state, (ii) generally recognized as criminal under the laws of states that have reasonably developed legal systems, or (iii) an offense against public order, and (b) either (i) the injury results from the failure of the state to take reasonable measures to prevent the conduct causing the injury, or (ii) the state fails to take steps to detect, prosecute, and impose an appropriate penalty on the person or persons responsible for the conduct if it falls within Clause (a)(i).[133]

It would appear that persons injured in airport terrorist attacks can make a case for recovery from the government under the Restatement rule. It is clear that terrorist attacks are universally held criminal within the meaning of section 183(a)(i) or (ii). Also, terrorism is certainly an "offense against the public order" under section 183(a)(iii). Plaintiffs in a Hellenikon situation face only one difficulty in establishing negligent failure to protect. Although the presence of Greek security police should indicate that the government recognized a duty to protect airport visitors, plaintiffs might have difficulty showing that the government had not taken "reasonable measures" to protect them. It is doubtful that even the most stringent security measures could prevent a sudden attack of this nature. However, to the extent that plaintiffs can show that the government was negligent in carrying out its security responsibilities, they should be able to recover.[134]

Of course, the potential for establishing recovery under the Restatement rule must be tempered with the realistic view that some nations refuse to be bound by international law.[135] Consequently, although a claim under international law has the advan-

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[133] RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 183 (1965).

[134] It is generally recognized under principles of international law that a government is not responsible for injuries caused by private persons to aliens unless it can be shown that the respondent government has failed to exercise reasonable care to prevent such injuries in the first instance or it has failed to take suitable steps to punish the offenders . . . .

M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 738 (1967) (quoting Letter from Assistant Legal Advisor for International Claims (English) to John W. Smetana (July 17, 1957) (on file with U.S. Dept. of State, file 251.1141, Smetana, John W. 17-257)).

[135] "At any moment of time, international law seems to be chaotic and uncertain; 'double standards' often appear to bind weak or law-abiding states, while permitting the ruthless or strong to satisfy their demands with impunity." Masters, *World Politics as a Primitive Political System*, in INTERNATIONAL POLITICS AND FOREIGN POLICY 114 (J. Rosenau ed. 1969).

tage of placing the risk of loss on the party best able to both spread the cost and deter terrorism, it is still not a comprehensive solution to the terrorist attack problem.

V. CONCLUSION

There are numerous defects in the existing set of legal responses to the problem of deterring airport terrorist attacks and compensating the victims. The recent move by two courts[136] to expand article 17 of the Warsaw Convention to hold airlines strictly liable for terrorist-inflicted injuries in some cases is particularly susceptible to criticism. The possibility of international criminal sanctions against terrorists and negligence actions against airlines are also lacking as comprehensive solutions. The best alternative currently available is international law claims against the host governments that operate the airports. Weaknesses in this approach are problems of sovereign immunity and the failure of some nations to recognize the applicable international law.

The unavoidable conclusion is that judicial responses do not currently offer any fully satisfactory solution. Legal reform or response mechanisms outside the legal system are necessary to fill the void. For example, the courts could abandon the *Day* and *Evangelinos* rationale and hold that article 17 creates liability only when passengers are under the airline's exclusive control and exposed to a risk clearly associated with air travel. To compensate victims outside the reach of article 17, states might agree to waive sovereign immunity and apply applicable tort law.

If such legal reforms are not forthcoming, it would be desirable to examine the possibility of applying war risk clauses in standard insurance policies to cover terrorist attack injuries.[137] If present war risk insurance does not prove to be a viable alternative, a new system of mandatory terrorist insurance may be satisfactory. Whatever the form of the ultimate solution, it must be designed to both compensate the victims and promote attack deterrence.

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[136] *See* text accompanying notes 50-107 *supra*.

[137] *See* Comment, *Acts of Terrorism and Combat by Irregular Forces—An Insurance "War Risk"?* 4 CALIF. W. INT'L L.J. 315 (1974).